

4 Official Opinions of the Compliance Board 6 (2004)

NOTICE REQUIREMENTS – FAILURE TO GIVE TIMELY PUBLIC NOTICE VIOLATED ACT – “MEETING” – QUESTION WHETHER QUORUM CONVENED CANNOT BE RESOLVED, BECAUSE INTERPRETATION OF MUNICIPAL CHARTER REQUIRED

January 8, 2004

Ms. Charlotte A. Price

The Open Meetings Compliance Board has reconsidered your complaint that the Town Council of Capitol Heights violated the Open Meetings Act by failing to give the required notice of a meeting that was held on March 31, 2003, and by failing to open the meeting to all who might have wanted to attend. The Compliance Board initially responded to your complaint by issuing an opinion based on the information then available to the Board. In that opinion, having understood that a quorum of Town Council members did not convene on March 31, 2003, the Compliance Board found that the Act was not violated with respect to the conduct of the meeting. The Board was unable to state an opinion whether the Act’s notice requirement was satisfied. Opinion No. 03-13 (July 24, 2003).

Shortly after the opinion was issued, you wrote to the Compliance Board to request that we reconsider the matter. You indicated that the opinion was based on incorrect information and that we should convene an informal conference in Capitol Heights to obtain fuller and more accurate information. We granted your request and, on November 10, 2003, held an informal conference at which you, the Mayor, members of the Town Council, and others with pertinent information participated. In addition, on December 1, 2003, we received from Mayor Nixon the minutes from March 31 that were described at the informal conference and that we subsequently requested.¹

Based on the additional information that we have gained, we vacate Opinion No. 03-13 and address your complaint fully in this opinion. For the

¹ In order to await these minutes, we deferred issuance of this opinion beyond the normal 30 days.

reasons stated below, we are now able to conclude that the Town Council violated the Open Meetings Act by failing to provide timely notice of a Council meeting called for March 31. We are unable to express an opinion whether the Act applied to the March 31 session as it actually occurred.

I

Complaint, Response, and Additional Information

The complaint alleged that on March 31, 2003, the Town Council of Capitol Heights held a special meeting, called by Councilman Springs, “to discuss actions that had been initiated by Mayor Joyce Nixon.” The complaint alleged that “no notice of this meeting was given to the public. There was no mention in a newspaper or posted notice at Town Hall or any other prominent place within the Town.” You indicated that you had learned of the meeting directly from Councilman Springs. The complaint continued: “Upon arriving at the Town Hall, the door was locked. Councilman Springs opened the door and announced that there was no meeting. I reminded him that he had told me that there was a meeting. He went to check with other council members inside, returned, and admitted myself, another resident, and a reporter for the Gazette newspaper. I was also informed that another resident was refused admittance prior to my arrival. No other residents attended. Surely, other residents would have attended if proper notice had been given.”

By letter dated April 7, 2003, the Compliance Board sent a copy of this complaint to Mayor Nixon, with a copy to the town’s attorney. By letter of May 15, 2003, Mayor Nixon indicated that she had provided a copy of the Compliance Board’s letter to Councilman Springs, who had called the March 31 meeting. Mayor Nixon’s letter continued: “I have asked Councilmember Springs and the other Council attendees to develop the response for submission to your office since I was unable to attend the meeting.” Mayor Nixon also requested an extension of the deadline for the Town’s response to June 15. The Compliance Board granted this request for an extension.

By letter dated June 13, 2003, Mayor Nixon stated that she had “sought, but had been unsuccessful in obtaining the rationale or justification that demonstrates the need and urgency for the meeting held on March 31, 2003.” She pointed out that she herself had not attended the meeting. “Two council members, responding to my request for a reason for the council’s action, have indicated that they were also notified late and as a result were unable to attend

as well.”² Mayor Nixon continued: “ The council members requesting the meeting and those in attendance in the meeting have failed to respond to my request for the rationale for [their] actions.” Under the circumstances, Mayor Nixon stated that she was “unable to respond to your request, other than to state that the meeting was action taken by council members acting on their own.”

At the request of the Compliance Board, Councilman Springs provided a separate response. By letter of July 7, 2003, he indicated that the March 31 “Special Meeting” was called as a result of his motion, which the Council approved through polling on March 25. According to Mr. Springs, appropriate notice of the meeting was given. On March 31, however, the Council did not have a quorum. Residents who attended and a newspaper reporter were “allowed to engage in an open discussion with the council members who were present.”

These were the sources of information available to us at the time of our July opinion. As indicated above, we now have further information derived from the informal conference on November 10 and a 31-page set of minutes describing the discussion on March 31. We shall refer to this additional information as appropriate in our discussion below.

II

Discussion

A. Notice

When a meeting subject to the Act is scheduled, a public body is required to give the public notice of it. §10-506.³ Because a public body may not assume that a quorum will fail to materialize, deficiencies in notice are not excused even if a quorum failure does occur. *See* Compliance Board Opinion No. 01-4 (February 22, 2001), slip op. at 3-4.

² Letters from Councilwoman Carroll and Councilman Miller to this effect were attached to Mayor Nixon’s letter.

³ All statutory references in this opinion are to the State Government Article, Maryland Code.

There remains a dispute whether any public notice of the meeting scheduled for March 31 was given. The complaint asserted that no public notice was given, and at the informal conference, you reiterated that no notice was posted on the door of the Municipal Center or otherwise available to the public. By contrast, Ms. Simmons, who provides administrative support for the Council, said that notice was posted on three doors of the building.

The Compliance Board has been provided with a copy of a memorandum from Councilman Springs, dated March 25, 2003, to the Mayor and Council members announcing the time and place of the meeting. The public was entitled to this information as well. Had this document been made available to the public by posting, its content would have met the Act's requirement. However, no one has confirmed that the memorandum was itself posted on the doors or otherwise served as public notice (as distinct from notice within the Council). Indeed, despite the Compliance Board's request, no copy of the alleged public notice has been provided.

Under the circumstances, we are skeptical about the claim that public notice was provided. If it had been, producing a copy for the Board should have been an easy matter. Nevertheless, because we are not constituted to resolve disputed issues of fact, we refrain from expressing a conclusion on this point. *See* §10-502.5(f)(2).

We are able to conclude, however, that even if public notice had been provided, the notice was given too late. The March 31 session was scheduled as a result of Council action on March 25. At the informal conference, Ms. Simmons stated that the notice was posted on the doors at 4:00 or 4:15 p.m. on the day of the meeting. This was not "reasonable advance notice of the session," which the Act requires. §10-506(a). Members of the public who might have been interested in attending but who would need to arrange their schedules to do so were thwarted by the late posting. The notice should have been posted as soon as possible after the March 25 confirmation that the meeting was to be held. The failure to act promptly violated the Act.

B. Conduct of March 31 Session

For the sake of discussion, we shall assume the correctness of the complaint's allegations about the manner in which the March 31 session was conducted – that is, that the door was closed and members of the public were admitted selectively. These practices would violate the Act, however, only if the March 31 session can be characterized as a "meeting" subject to the Act. Under §10-502(g), the term "meet" means "to convene a quorum of a public body for the consideration or transaction of public business." The minutes for

the March 31 session amply confirm that the public business was considered.⁴ Consequently, the determinative issue is whether a “quorum” of the Council convened.

The Act has a general definition of “quorum”: “a majority of members of a public body.” §10-502(k)(1). Four Council members, a majority, were present on March 31. Indeed, the minutes for the session recite that a quorum was present. Nevertheless, the analysis cannot stop at this point, because the Act’s definition of “quorum” also defers to “any different number that law requires.” §10-502(k)(2). The relevant “law” here is the Charter of Capitol Heights.

Under Section 209(a) of the Charter, “Four Councilmembers and the Mayor shall constitute a quorum for the transaction of business.” Mayor Nixon did not attend the March 31 session. Under Section 218(a) of the Charter, however, “The Mayor shall appoint a Councilmember to serve as mayor pro tempore who, in the absence of the Mayor, shall exercise all of the powers provided to the Mayor by this charter” This latter provision suggests that, in the absence of the Mayor, four Councilmembers and the Mayor Pro Tem are sufficient for a quorum.

Assuming that our understanding of the Charter is correct so far, we turn to the question whether the Mayor Pro Tem was present, along with the four Councilmembers, on March 31. We are unable to answer this seemingly straightforward question. The minutes of the Council’s March 24 meeting contain an announcement by Mayor Nixon that, among other decisions, she was “changing the Mayor Pro Tem from Evelyn Grimes to Darrell Miller.” At the March 31 session, Ms. Grimes was present; Mr. Miller was not. Therefore, if Mr. Miller were validly serving as Mayor Pro Tem on March 31, the session lacked a quorum as defined in the Charter, for neither the Mayor nor the Mayor Pro Tem was present. Some of those participating on March 31, however, pointedly questioned the Mayor’s authority in this regard.⁵

Obviously, we are not able to offer an authoritative interpretation of the Charter of Capitol Heights. Consequently, we cannot reach a conclusion whether the Open Meetings Act applied to the March 31 session. We can only say that, if a quorum (as defined in the Charter) did convene, the meeting

⁴ The session concerned the validity of certain actions taken by the Mayor and, more generally, the powers of the Mayor under the Charter of Capitol Heights.

⁵ The contention, in brief, appears to be that the Mayor’s power to appoint does not include the power to remove without Council approval.

should have been genuinely open to any member of the public who wished to attend. If a quorum did not convene, the Act did not apply.

III

Conclusion

The Open Meetings Compliance Board finds that the Town Council of Capitol Heights violated the Open Meetings Act by failing to provide timely public notice of a meeting intended to be held on March 31, 2003. Because we cannot determine whether a quorum was present on March 31, we are unable to reach a conclusion whether the Act applied to the actual conduct of the session.

OPEN MEETINGS COMPLIANCE BOARD

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